Supreme Court of the United States,

OCTOBER TERM, 1904.

GEORGE W. BEAVERS,
Appellant,

against

CHARLES J. HAUBERT, United States Marshal, in and for the Eastern District of New York.

No. 354.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final order made at a Stated Term of the District Court of the United States in and for the Eastern District of New York on the 5th day of July, 1904, dismissing appellant's writs of *habeas corpus* and *certiorari* and remanding him to the custody of the Marshal (fols. 205–211).

On July 16th, 1903, two indictments were returned by a Federal Grand Jury in the Circuit

Court of the United States in the Eastern District of New York, and on July 25th, 1903, a third indictment was returned in the same Court, charging the appellant with violations of Sections 1781 and 1782 of the United States Revised Statutes (fols. 3, 24, 41 and 61). A proceeding was thereafter instituted in the Southern District of New York to compel the removal of the appellant to the Eastern District of New York, for the purpose of securing his arraignment and trial on these indictments before the Circuit Court in the latter district (fol. 3). This proceeding resulted in a warrant of removal to the Eastern District of New York signed by District Judge Holt on the 10th day of November, 1903. Pursuant thereto and to an order entered in the Circuit Court of the United States for the Southern District of New York, upon the mandate of this Court issued in the case of *George W. Beavers* vs. *William Henkel* (194 U. S., 73), the appellant surrendered himself and gave recognizance for his appearance in the Circuit Court of the United States for the Eastern District of New York at the next regular term thereof for the trial of bail cases (fols. 3–5). On May 28th, 1903, Hon. William J. Youngs, United States Attorney for the Eastern District of New York, notified appellant to appear before the United States Circuit Court in that district on June 1st, 1904, to plead to the indictments there pending against him (fols. 5, 79).

In response to this notice the appellant appeared and his arraignment for pleading was moved by the District Attorney (fol. 5). The appellant was thereupon accorded one week's time in which to prepare and make certain motions with reference to the in-

dictments. On the 8th day of June, 1904, appellant appeared before the Circuit Court to plead to the indictments (fol. 5). His counsel also appeared and were prepared to argue motions to quash, and, in the event of an adverse decision, to argue for bills of particulars as to each of these indictments. At this time the United States Attorney refused to proceed with the prosecution of the appellant before the Circuit Court in the Eastern District of New York, but stated that it was his intention instead to institute proceedings for the removal of the accused to the District of Columbia (fol. 5).

The Court thereupon adjourned the motions from time to time, directing the appellant to appear whenever required, and enlarged him to bail upon the former recognizance (fols. 6, 75). While the appellant was in attendance upon the Circuit Court for the purpose of pleading to the indictments there pending, and while he was still in the custody of that Court and by it enlarged to bail, he was on the 8th day of June, 1904, arrested and taken into custody by the Marshal of the Eastern District of New York upon a warrant to apprehend issued by B. Lincoln Benedict, Esq., a Commissioner of the United States for the Eastern District of New York, on the 3d day of June, 1904 (fols. 6, 11). Upon this warrant the appellant was on the same day taken before the Commissioner. The complaint on removal, verified by Frank E. Little, a Post Office Inspector, set forth the finding of an indictment against the appellant in the Supreme Court of the District of Columbia on the 5th day of October, 1903, purporting to charge a violation of Section 5501 of the United States Revised Statutes, and

asked that appellant be held to await a warrant of removal to the District of Columbia (fols. 8, 101–109).

The appellant, having protested against his arrest and objected to the jurisdiction of the Commissioner, demanded a hearing under Section 1014 of the United States Revised Statutes, which hearing was accorded him (fols. 124–202). On June 17th, 1904, the appellant secured from the Circuit Court of the United States in the Eastern District of New York, a writ of *habeas corpus* to relieve him of his unlawful arrest under the Commissioner's warrant to apprehend of June 3d, 1904. This writ is the subject of the appeal in case No. 355 upon the Calendar of this Court for the October Term, 1904 (see record in that case fols. 42–44). At the hearing the prosecution offered in evidence an examplified copy of the indictment filed in the Supreme Court of the District of Columbia and a duplicate of the original warrant of arrest (fols. 130–142), established the identity of the accused, and rested (fols. 130–142).

After hearing the appellant's witnesses (fols. 143–202), and denying his motion to dismiss (fols. 199–202), the Commissioner on June 29th, 1904, committed him to the custody of the Marshal to await the warrant of removal of the District Judge (fol. 202). Thereafter and on July 5th, 1904, simultaneously with the application of the prosecuting attorney for a warrant of removal to the District of Columbia, appellant secured from the District Court writs of *habeas corpus* and *certiorari* to review his arrest and commitment (fols. 81–83). Return was made, and on July 5th, 1904,

both writs were dismissed (fols. 205–212) and the appellant was remanded to custody. Thereupon this appeal was duly allowed and perfected (fols. 212–232).

The appellant upon this appeal contends:

First.—That his arrest under a Commissioner's warrant on the 8th day of June, 1904, and subsequent commitment, while appellant was already in custody of the Circuit Court of the United States, was unlawful because it deprived him of his liberty without due process of law.

Second.—That the refusal of the District Attorney to proceed with the prosecution and the failure of the Court below to discharge Beavers from the arrest complained of deprived him of his constitutional right to a speedy trial in the Eastern District of New York.

Third.—That the positive evidence adduced by the appellant before the Commissioner was such as wholly to deprive the indictment of its *prima facie* probative force, and that the decision of the Commissioner was in effect a determination that the indictment was conclusive evidence.

The errors duly assigned and now relied upon by the appellant are as follows:

The Court erred:

In refusing to discharge the said petitioner.

In holding that the arrest and restraint of the petitioner is legal.

In holding that the restraint of your petitioner is not a violation of his constitutional right not to be

deprived of his liberty without due process of law, guaranteed by the Constitution of the United States, in Article Fifth of the Amendments thereof.

In holding that the arrest and detention of your petitioner was not in violation of his constitutional rights.

In holding that the said Commissioner at the time of the arrest or arraignment of your said petitioner or at any other time had any jurisdiction, right or authority to issue a warrant for the arrest of your petitioner, to require bail of your petitioner or commit your petitioner in default of such bail.

In holding that the probative force of the said indictment was not utterly destroyed by the direct and positive testimony adduced on behalf of the petitioner.

In holding that there was probable cause to believe the petitioner guilty of a crime against the United States in the District of Columbia.

In holding that the said indictment was conclusive proof of probable cause.

ARGUMENT.

I.

THE ARREST AND COMMITMENT OF THE APPELLANT ON WARRANTS ISSUED BY A UNITED STATES COMMISSIONER IN A PROCEEDING BROUGHT TO EFFECT HIS REMOVAL TO THE DISTRICT OF COLUMBIA, WHILE HE WAS IN THE CUSTODY OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK FOR TRIAL, AND SUBJECT TO ITS JURISDICTION, WAS VOID, BECAUSE IT WAS AN UNLAWFUL INTERFERENCE WITH THE JURISDICTION OF THE CIRCUIT COURT OF THE UNITED STATES IN THE EASTERN DISTRICT OF NEW YORK, AND A VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS.

On June 8th, 1904, when the appellant was arrested under the Commissioner's warrant to apprehend, issued on June 3rd, 1904, he was already in the custody of the law. A warrant directing his removal to the Eastern District of New York had been issued (fol. 72). He had entered into a recognizance (fol. 75) in the sum of ten thousand dollars, the condition of which was that he should personally appear before the Circuit Court of the United States for the Eastern District of New York, on the first day of the next regular term for the trial of bail cases, then and there to answer unto an indictment pending therein, and "then and there render himself unto the jurisdiction of the said

Court and obey and abide the orders of said Court and not depart therefrom without the leave of said Court." At the request of the United States Attorney (fol. 79) he had appeared before the Circuit Court. Process had been issued for his apprehension, and by the aid of it his presence before the Court had been secured. His arraignment upon the indictments there pending against him had been actually moved by the prosecuting attorney (fol. 5). Motions in respect of the indictments were there pending undetermined. He appeared from time to time at the Court's direction and in every way rendered himself amenable to the jurisdiction of the Circuit Court of the United States for the Eastern District of New York. This jurisdiction had not only attached but was well started toward completion. All of these events occurred prior to the issuance and execution of the Commissioner's warrant. It cannot, therefore, be disputed that at this time the Circuit Court had acquired complete and primary jurisdiction over the person of the accused.

In criminal cases priority of jurisdiction is determined by the date of service of process (*U. S.* vs. *Lee*, 84 Fed., 631; *Craig* vs. *Hoge*, 28 S. E. (Va.), 317; *Union Mutual Life Ins. Co.* vs. *University of Chicago*, 6 Fed., 443; *Owens* vs. *R. R. Co.*, 20 Fed., 10; *Wilmer* vs. *R. R. Co.*, 30 Fed. Cases, 73; *Herndon* vs. *Ridgway*, 17 How., 424; *Chaffee* vs. *Hayward*, 20 How., 208, 215; *Boswell's Sons* vs. *Otis*, 9 How., 336, 348. *Pennoyer* vs. *Neff*, 95 U. S., 714; *Mexican Central Ry.* vs. *Pinkney*, 149 U. S., 194, 209).

The fact that Beavers had given bail on the first arrest and was not in actual custody of the

Marshal when the second arrest took place is immaterial (*In re Beavers*, 125 Fed., 988). By admission to bail the appellant had not been relieved from custody. His prison walls had been enlarged so that temporarily they surrounded the limits of the Eastern District of New York. It cannot be said that a person who cannot leave a defined territory is not restrained of his liberty. If Beavers was in custody pending the trial of these indictments, he was in theory of law in the possession of the Marshal, which possession was that of the Circuit Court. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment" (*Taylor* vs. *Taintor*, 16 Wall., 371). The rule that a person admitted to bail is potentially in custody, and so remains until discharged from imprisonment, is as old as the common law. Bacon's Abridgement says: "His bondsmen are his gaolers of his own choosing." In *Anon's Case* (6 Mod., 231), it is said: "The bail have their principal on a string, and they may pull the string whenever they please and render him in their own discharge." The principle is established by many authorities. (*Cosgrove* vs. *Winney*, 174 U. S., 68; *In re Grice*, 79 Fed., 633; *U. S.* vs. *Stevens*, 16 Fed., 105; *Turner* vs. *Wilson*, 49 Ind., 581; *Divine* vs. *State*, 5 Sneed., 625; *Levy* vs. *Arnsthall*, 10 Grat. (Va.), 641; *Ex parte Gibbons*, 1 Atk., 238; Spear on Extradition, p. 445; Petersdorf on Bail, pp. 91, 406).

It is a fundamental maxim or principle of jurisprudence that where the jurisdiction of a competent court has attached either to a person or to a thing,

that jurisdiction remains exclusive in effect until it has wrought its function. This is the principle invoked by the appellant in this case. It has been applied in many distinct classes of cases and illustrations of its application abound.

In every instance where a conflict of jurisdiction has arisen between a State and Federal court, but one rule has been adopted. The Court whose jurisdiction has first attached to the person or thing, has universally held and retained it until its completion. No other Court has been permitted by its process to interfere with the jurisdiction of the Court which has first attached. Few propositions are more clearly established by judicial decision (*Byers* vs. *McAuley*, 149 U. S., 608, 614, 615; *Hagan* vs. *Lucas*, 10 Peters, 400; *Taylor* vs. *Carryl*, 20 How., 583; *Peck* vs. *Jenness*, 7 How., 612, 625; *Freeman* vs. *Howe*, 24 How., 450; *Ellis* vs. *Davis* 109 U. S., 485,498; *Krippendorf* vs. *Hyde*, 110 U. S., 276, 280; *Covell* vs. *Heyman*, 111 U. S., 176; *Borer* vs. *Chapman*, 119 U. S., 587, 600; *In re Chambers, Calder & Co.*, 98 Fed., 866; *Jordan* vs. *Taylor*, 98 Fed., 643; *Keegan* vs. *King*, 96 Fed., 758; *Chapin* vs. *James*, 11 R. I., 87; *The E. L. Cain*, 45 Fed., 367; *Moran* vs. *Sturges*, 154 *U.* S., 256, 269, 279; *Ex parte Chetwood*, 165 U. S., 443, 460; *Pac. Coast S. S. C.* vs. *Bancroft Whitney Co.*, 94 Fed., 186; *Yonley* vs. *Lavender*, 21 Wall., 276; *Sharon* vs. *Terry*, 36 Fed., 337; aff'd 131 U. S., 40).

The same principle is universally applicable where Federal and State Courts each claim jurisdiction over the same person at the same time (*Abelman* vs. *Booth*, 21 How., 506; *Tarble's Case*, 13 Wall.,

397; *Robb* vs. *Connelly*, 111 U. S., 624; *In re Spangler*, 11 Mich,, 298; *In re James*, 18 Fed., 853).

It has also been uniformly adopted whenever a State has sought the rendition of a fugitive from another State having him in custody. Though the duty of rendition is ordinarily absolute, it is settled in such cases that "where a fugitive whose surrender is demanded is held in custody in the State upon which the demand is made on account of an offense committed therein, the duty to surrender is postponed until the existing charge against the prisoner has been satisfied" (Am. & Eng. Encyc. of Law, Vol. 12, p. 604; *Matter of Troutman*, 24 N. J. Law, 634; *Matter of Briscoe*, 51 How. Pr., 422; *Hobbs* vs. *State*, 22 S. W. R. (Tex.), 1035; *Taintor* vs. *Taylor*, 36 Conn., 242; *Taylor* vs. *Taintor*, 16 Wall., 366; *Ex parte Rosenblat*, 51 Cal., 285; Clark Cr. Proc., p. 63; Spear on Extradition, pp. 442–445).

Equally established is its application whenever Federal Courts of different districts have asserted jurisdiction at the same time over the same personal property (*Re Miller*, 30 Fed., 895; *Ames* vs. *Ry. Co.*, 60 Fed., 967, 974; *Clyde* vs. *Richmond & D. R. Co.*, 65 Fed., 336; *Chattanooga Terminal Ry. Co.* vs. *Felton*, 69 Fed., 273, 283; *N. Y. Security & Trust Co.* vs. *Equitable Mtge. Co.*, 71 Fed., 556; *Wiswall* vs. *Sampson*, 14 How., 60).

The appellant contends that this principle is not restricted in its application to questions of jurisdiction between courts of different sovereignties, but is applicable wherever two courts subject to the same general sovereignty and existing under the same judicial system seek to exercise criminal jurisdic-

tion over the same person for antagonistic purposes at the same time. In its precise application to the case at bar the authorities relating to the question are not numerous. But though few, the reported decisions dealing with the subject indisputably recognize that the principle of the exclusiveness of a jurisdiction which has once attached is not confined in application to conflicts between courts of different sovereignties, but is applicable between co-ordinate Federal Courts existing under the same general constitutional authority.

In re Johnson, Petitioner (167 U. S., 125), this Court distinctly held that the principle here invoked was decisive in conflicts of jurisdiction between different Federal tribunals.

In that case, on July 24th, 1896, a warrant was issued by a Commissioner for the Southern District of Indian Territory to arrest one Johnson for a crime alleged to have been committed within that district on that day. Subsequently and on October 9th, he was indicted at a regular term of the United States Court for that district and on October 17th was arraigned, tried and convicted. On July 25th a warrant was issued by a Commissioner of the United States for the Eastern District of Texas, charging Johnson with the commission of the same crime. The Marshal for the Eastern District of Texas demanded the surrender of the prisoner from the custody of the Marshal in the Southern District of Indian Territory, which surrender was refused. Mr. Justice Brown, in sustaining the jurisdiction of the Court for the Southern District of Indian Territory, which had first attached to the person of the accused, said:

"In this connection, jurisdiction of the case,

i. e., the crime, is undistinguishable from jurisdiction of the person who is accused of the crime. *We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between Federal and State courts should not determine this question.* Ever since *Abelman* vs. *Booth* (21 How., 506), it has been the settled doctrine of this Court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. This rule was affirmed in *Tarble's Case*, (13 Wall., 397); in *Robb* vs. *Connelly*, (111 U. S., 624); in *re Spangler* (11 Mich., 298); and with reference to personal property, has been so often restated as to have become one of the maxims of the law."

In *In re Beavers* (125 Fed., 988) a question almost precisely similar to the case at bar was decided by District Judge Holt, of the Southern District of New York, in favor of the accused. While Beavers was in the Southern District of New York, and after he had been arrested and brought before a Commissioner in a proceeding to secure his removal to the Eastern District of New York, the Department of Justice instituted before the same Commissioner four other proceedings, the purpose of each of which was to effect his removal to the District of Columbia. The learned District Judge held that these proceedings could not co-exist, and said :

"I think that in such a case, although the issuance of the warrant was proper, it would be the duty of the Marshal not to execute it, but to hold it pending the decision of the Commissioner in

the proceeding for the removal of the defendant from this District to the Eastern District of New York. If for any reason the Commissioner should decide in the first proceeding that the petitioner should not be removed, then it would be the duty of the marshal to arrest him and hold him under the warrant of the second proceeding, but until the first proceeding is determined, I think that no other arrest can be permitted. * * * *The only possible rule is that a Court which has in its custody a person charged with a crime, has exclusive control and jurisdiction until the question of his guilt or innocence is determined, and, if he is found guilty, until the period of his imprisonment has expired.*"

On the argument of this writ before the Court below, it was disposed of upon the opinion delivered in *In re Beavers* (131 Fed., 366) (see record of *Beavers* vs. *Haubert*, Calendar No. 355, fol. 54). The learned Court conceded that when the jurisdiction of a competent Court has once attached to a person or thing, that jurisdiction should remain exclusive in effect until it has wrought its function ; but contended that this principle has no application to the present case, because the Court seeking to exercise jurisdiction over the appellant was subject to the same sovereignty, and existed under the same judicial system as the Court from which a removal was sought. The Court further held, that even if the principle did apply, the latter Court might at its pleasure waive and surrender its jurisdiction to another Court, subject to the same general sovereignty.

As has been already shown, the mere fact that two Courts which seek to assert jurisdiction over the same person at the same time are a part of the

same judicial system, cannot take the case out of the principle which controls every other instance of conflicting jurisdiction.

Neither the decision in the *Johnson* case (167 U. S., 125) nor in the *Beavers* case (125 Fed., 988), nor in the receivership cases (*Re Miller*, 30 Fed., 895; *Clyde* vs. *Richmond Ry. Co.*, 65 Fed., 336; *N. Y. Security & Trust Co.* vs. *Equitable Co.*, 71 Fed., 556) is reconcilable with the view that the principle of the exclusiveness of jurisdiction is limited to conflicts between courts of different sovereignties. Instead, as this Court said in *Buck* vs. *Colbath* (3 Wall., 344–349): "This principle is essential to the dignity and just authority of every court and to the comity which should regulate the relations between all courts of concurrent jurisdiction." The reasons are obvious. Without its existence, different courts and different officers of co-ordinate courts would be brought into unseemly collision, each striving to possess the same person or thing at the same time. The possession of one officer under due process would afford no exemption to the person or property so taken into custody from another arrest or further levy under process issued from another court. It would be the duty of the officer having lawful possession to defend by all necessary force that possession, even though the person seeking to disturb it should be an officer authorized by another co-ordinate court to take possession of the person or thing in question. Such a condition would be intolerable. The only possible rule is that a jurisdiction once attached must be exclusive, and a custody once acquired not to be legally interfered with by any other officer or tribunal whatever, of equal or in-

ferior rank, irrespective of the source of its creation, until the jurisdiction is exhausted or the custody relinquished. No other rule is reconcilable with that forbearance which courts of co-ordinate jurisdiction administered under a single system are said to exercise towards each other by avoiding interference with each other's process (*Covell* vs. *Heyman*, 111 U. S., 176).

No other rule is consistent with the obligation owed in criminal cases by every court to the citizens of its own district. The crime for which a removal was sought involved no greater turpitude than those for which the accused was about to be tried (U. S. Revised Statutes, Sections 1781, 1782, 5501). It is certainly more important to the citizens of the Eastern District of New York and to the accused, and quite as important to the country at large, that the accused be tried and punished for crime committed in the Eastern District of New York, the place where he resides and has his home, or acquitted there of the charges pending against him, as that he should be taken to another district and tried, punished or acquitted for another crime no more grave than that with which he is charged in the Eastern District of New York. If, as this Court has said, with reference to rendition under these circumstances, "it is absurd to say that the Constitution requires that he should be surrendered to the other State on a requisition being made, for the State surrendering him would have an equal right to require that he be returned again," it is equally unreasonable to direct the removal of the accused person to the District of Columbia in the present case, before the Circuit Court of the East-

ern District of New York has fulfilled its proper functions, because it would have an equal right to require his return. Such an act is without judicial precedent. It might even be made a dangerous precedent because, within the principle of the decision of the Court below, before he can be tried in the District of Columbia, the accused may be again removed and returned to the Eastern District of New York, or taken from district to district without trial in any district, as the Department of Justice may elect. That this result is not to be apprehended in the present case is immaterial, for statutory provisions should be interpreted in the light of all that may be done under them (*Beavers* vs. *Henkel*, 194 U. S., 73). An orderly administration of justice requires the retention by the Circuit Court of the United States of the Eastern District of New York of a jurisdiction once acquired.

We refer by way of analogy to the reasoning in similar cases arising in interstate rendition proceedings.

In *Matter of Troutman* (24 N. J. L., 634) the Court declined on *habeas corpus* to deliver up an accused person upon the requisition of the Governor of the State of Pennsylvania, since it appeared that the person was detained by civil process in the State of New Jersey. The same ruling was made in *Matter of Briscoe* (5 How. Pr., 422), where it was forcibly said :

" When a party is detained in one State because the laws of that State have claims upon him, can such a person be extradited and taken into another State before the justice of the State which holds him has first been satisfied ? In other words, is the

right of the State to demand the alleged fugitive in order that he may be compelled to answer to its laws, superior to that of the State which holds him for a similar claim? If it is, then State comity is above State preservation, and the obligation of man to his fellows is superior to that which he owes to himself. There can be no middle ground upon the question before us. The Constitution of the United States, if it means that the surrender must be made, though the State holding the fugitive has demands upon him, must require his delivery in every case without regard to the right of the State in which he is. If he is then wanted for murder committed within its jurisdiction, he must be surrendered even though demanded to answer elsewhere for simple petit larceny. This extreme case is put to illustrate the danger of the position taken."

In *Taintor* vs. *Taylor* (36 Conn., 242) where the respective rights of the States of Connecticut and Maine to the rendition of an accused person from the State of New York were discussed, it was pointed out that if he "had remained in this State (Connecticut), he would not have been surrendered on a requisition made by the Executive of the State of Maine. It was more important to this State and just as important to the country at large, that he should be punished for crime committed here, as that he should be taken to Maine and punished for crime committed there. The requirement of the Constitution was never intended to apply to such a case. This is obvious; for if a party commits crime in two different States, and one of them has him in custody awaiting trial, it is absurd to say that the Constitution requires that he should be surrendered to the other State on requisi-

tion being made, for the State surrendering him would have an equal right to require that he be returned again. *This State had a superior right to him, inasmuch as she had moved first to punish him, if guilty, for crime committed here.*" These views were approved in *Taylor* vs. *Taintor* (16 Wall., 366) and the judgment of the State Court affirmed. "The legal principle involved in this decision," says Spear in his work on Extradition, at page 445, "is that where jurisdiction has already attached to a case, it is, in the absence of any provision to the contrary, to be deemed exclusive until it has wrought its function. This jurisdiction being then operative takes precedence of the one claimed until its purpose shall have been completed. The same rule operates where the party is by bail released from actual confinement. He is to all intents and purposes still in the custody of law, as a prisoner against whom the law has been put in force and in respect to whom its claims are not yet determined."

The Court below, while not denying that all jurisdiction is in its nature exclusive in effect, held that the removal of an accused person constituted a waiver of the jurisdiction of the Court ordering it, which that Court in its discretion might make, and of which the accused was not entitled to complain. However true this may be, it can have no application to the present case, because it affirmatively appears that the Circuit Court never abandoned its jurisdiction of this appellant.

The record shows that his recognizance was in full force and effect at the time of the arrest complained of and at the time the writs were secured

(fols. 6-8). The existence of this recognizance is conclusive evidence that the Circuit Court of the Eastern District of New York has not waived its jurisdiction over the accused, but asserts and exercises it to-day.

By virtue of this recognizance, the appellant was and is in the potential custody of the Circuit Court of the United States (*Taylor* vs. *Taintor*, 16 Wall., 371; *In re Beavers*, 125 Fed., 988; *Cosgrove* vs. *Winney*, 174 U. S., 68). The purpose of that custody was and is for trial by the Circuit Court in the Eastern District.

The proceeding for Beavers' removal was begun by the warrant of a Commissioner, an officer of the District Court, and could, if effective for any purpose, culminate only in a warrant of removal signed by the District Judge (R. S., 1014).

We contend that neither the Commissioner of the District Court nor the District Judge, sitting as such, had power to interfere with the custody of the Circuit Court, and waive its jurisdiction by effecting the removal of an accused person.

Suppose the sureties on Beavers' recognizance had surrendered him in their own discharge, and while the Marshal held him in the custody of the Circuit Court to await its mandates, a new warrant had been placed in the Marshal's hands issued by a United States Commissioner, ordering his appearance before the Commissioner, at the day and hour on which his appearance was required before the Circuit Court; or suppose a warrant were issued by a District Judge or Court ordering the Marshal to relinquish altogether this custody and deliver the accused to another

tribunal; which tribunal would the Marshal obey? Would the process of the Commissioner or of the District Court or Judge supercede the process of the Circuit Court; or would its execution be void in so far as such interference was attempted?

In *Hobbs* vs. *State* (22 S. W. Rep., 1035), the Court of Criminal Appeals of Texas discharged on *habeas corpus* a person arrested under an executive warrant of the Governor of Texas, issued on a requisition from the Governor of Tennessee, on the ground that the Courts of the State of Texas had acquired a prior criminal jurisdiction over the person of the accused. "This jurisdiction," said the Court, "being operative, takes precedence of the one claimed until its purpose shall have been completed. *The Governor of this State has no power by the issuance of his warrant to arrest its action.*"

A United States Commissioner is a subordinate ministerial officer, an arm or branch of the District Court, and is himself neither court nor judge (*U. S.* vs. *Allred*, 155 U. S., 595; *Todd* vs. *U. S.*, 158 U. S., 278; *Rice* vs. *Ames*, 180 U. S., 371–378; *U. S.* vs. *Schumann*, 2 Abb. U. S., 523; *U. S.* vs. *Jones*, 134 U. S., 483; *Re Ellerbe*, 13 Fed., 530; *In re Perkins*, 100 Fed., 950; *Ex parte Dole*, 7 Phila., 595). Even conceding the right of the Commissioner to *issue* process against the appellant, we contend that such process could not be lawfully *executed* by the Marshal against him so long as he was in the custody of a court of superior jurisdiction (*In re Beavers*, 125 Fed., 988; *Hobbs* vs. *The State*, 22 S. W. Rep., 1035; *Matter of Troutman*, 24 N. J. Law, 634; *Higgins* vs. *Dewey*, 39 N. Y. Rep., 94).

When Beavers was absolutely discharged from the custody and jurisdiction of the Circuit Court, then the Commissioner's warrant might properly be executed; but until that time no new arrest should have been permitted.

Whether or not the Circuit Court might have waived or relinquished its jurisdiction is immaterial. This was never done: first, because the appellant's recognizance was not cancelled, his appearance was ordered from time to time simultaneously with the progress of these proceedings and, if we may refer to facts *de hors* the record, his attendance on the successive terms of the Circuit Court of the Eastern District of New York has been required to the very date of this argument; and second, because, if the arrest of the appellant herein under a Commissioner's warrant was void, no subsequent willingness of the Circuit Court to waive its jurisdiction could give the arrest validity.

If the arrest of the appellant, while he was already *in custodia legis*, was void and deprived him of his liberty without due process of law, it follows that the execution of the Commissioner's warrant of commitment under which he is now held, was a further violation of his rights, which requires his discharge from such custody, in order that he may be brought to trial upon the charges now pending against him in the Eastern District of New York.

II.

THE REFUSAL OF THE DISTRICT ATTORNEY TO PROCEED WITH THE PROSECUTION AND THE FAILURE OF THE COURT BELOW TO DISCHARGE BEAVERS FROM THE ARREST COMPLAINED OF DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL BY JURY IN THE EASTERN DISTRICT OF NEW YORK.

When Beavers gave his recognizance for appearance before the Circuit Court, the process of that Court had become operative. When he appeared and his arraignment was moved, he became entitled to have his trial in that district proceed without unreasonable delay. But the District Attorney refused to proceed, and instead, instituted proceedings for his removal from the District. Since that time the District Attorney has had ample opportunity to prepare for trial, and many terms of the Court at which the accused in the usual course of procedure could have been tried, have been permitted to expire without such trial. The refusal of the District Attorney to proceed, and of the learned Court below to discharge appellant, have prevented this trial. When this was urged before the Court below, the Court held that a removal of the accused from the Eastern District of New York for trial in the District of Columbia did not impair his constitutional right to a speedy trial by jury, since the Constitution does not

assure to him a speedier trial in this District than in the District of Columbia, or does not permit him to select the forum in which he shall first be tried.

The jurisdiction of the Circuit Court has attached to him. The jurisdiction of the Supreme Court of the District of Columbia has not attached. The Constitution does not guarantee a speedy trial in the District of Columbia for crimes committed in the Eastern District of New York. The Constitution expressly prohibits such a trial when it provides by its Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

This article of the Constitution entitles an accused person to a trial at the earliest opportunity after allowing reasonable time to the prosecution to prepare for trial (Sutherland's Notes on the U. S. Constitution, p. 664; *U. S.* vs. *Fox*, 3 Mont., 312; see monograph note to *In re Begerow*, 85 Am. St., 178–204). And it is the duty of the prosecution diligently to prosecute, without vexatious, capricious or oppressive delays (*Nixon* vs. *State*, 41 Am. Dec., 601). Judge Cooley in his work on Constitutional Limitations, 7th Edition, p. 440, says: "When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses."

Beavers has made no selection of the place of trial. It is the Government, not the accused, which

selected the Court in the Eastern District of New York as the forum before which he should first be tried. Is this constitutional guarantee fulfilled or is it violated when a Court, having complete jurisdiction to try the accused, refuses to hear and determine the issue before it, and attempts to relinquish its jurisdiction by permitting the removal of the accused from the State and district wherein he stands charged with crime, to a district where trial upon those charges is impossible? The provision of the Constitution which guarantees him a speedy trial in the Eastern District of New York for crime committed there is not fulfilled by according him a trial, no matter how speedy, in the District of Columbia for crime committed there.

It may be said that if the accused be retained and tried in the Eastern District of New York, this would violate his right to a speedy trial in the District of Columbia. This cannot be, since the Courts of the District of Columbia have not as yet obtained jurisdiction over the accused. So long as a person accused of crime remains beyond the jurisdiction of the Court wherein he is charged, it can not be that he is entitled to the benefits of this provision of the Constitution. Otherwise he might, by remaining beyond the jurisdiction for an indefinite period of time, avail himself of this provision of the Constitution and, when sufficient time had elapsed, move for a discharge upon the ground that he had not been accorded a speedy trial. Clearly, an accused person does not become entitled to a speedy trial until the Court in which the indictment is found has acquired jurisdiction over his person and a speedy trial has thus been rendered possible.

The vigor of Beavers' late struggle, commented upon by the learned Court below, is not inharmonious with a desire for a speedy trial in the Eastern District of New York. It was an earnest effort to secure, not an indefinite postponement of trial, but a preliminary hearing and an examination upon the indictments. It arose from confidence in his ability to defeat the indictments against him in the Southern District, should he be accorded such a preliminary hearing as he conceived to be his right. So soon as this Court had rendered its decision, he prepared himself for trial upon the merits. Since that time the Government and not the accused, has attempted to evade a trial of the issues in the Eastern District.

When an indictment was found by the Grand Jury of the Eastern District of New York charging Beavers with the commission of crime against the United States within that District, and process had issued and had been duly executed, and he had appeared ready to plead and had demanded his trial, he became invested with a constitutional right to a speedy trial, of which neither the executive nor the judiciary could deprive him.

III.

THE POSITIVE EVIDENCE ADDUCED BY THE APPELLANT BEFORE THE COMMISSIONER WAS SUCH AS WHOLLY TO DEPRIVE THE INDICTMENT OF ITS PRIMA FACIE PROBATIVE FORCE, AND THE DECISION OF THE COMMISSIONER WAS IN EFFECT A DETERMINATION THAT THE INDICTMENT WAS CONCLUSIVE EVIDENCE.

Since the decision in *Beaver* vs. *Henkel* (194 U. S., 173) an indictment must, in a proceeding for removal under Section 1014 be deemed to constitute *prima facie* evidence, which, if unrebutted, will sustain a finding of probable cause. But this Court did not decide and has never held that an indictment might be accepted in such a proceeding as conclusive evidence of the facts therein set forth, in the face of primary evidence rebutting its material allegations. We contend that the effect of the Commissioner's finding in this proceeding, was to give to the copy of the indictment offered in evidence the effect of conclusive proof of the existence of probable cause, although every material allegation of this indictment was rebutted by competent primary proof.

At the hearing, a copy of the indictment was the only evidence offered of the petitioner's guilt. Six witnesses were called for the accused and he himself made a statement in his own behalf. The indictment alleged that Beavers on October 6th, 1900, entered into a corrupt agreement with W. Scott Towers, as agent of the Elliott-Hatch Book-

typewriter Company, whereby Towers promised to pay to Beavers on behalf of the company, twenty-five dollars out of each two hundred dollars paid to the company by the Government, and that Beavers on July 11th, 1901, received from Towers, as agent of the company, a draft for three hundred and fifty dollars, intending to have his decision and action in a matter then pending, or thereafter to be brought before him, in his official capacity, influenced thereby.

Henry J. Gensler, testified that from August, 1897, to December, 1899, he acted as the local agent and representative of the Elliott-Hatch Booktypewriter Company in the City of Washington (fol. 147), and sold book typewriters such as were bought by the Post Office Department to the trade in general for two hundred dollars a machine. This was the usual price paid for the machines and the figure at which they were bought by the Post Office Department. He did not know of sales being made for any less sum (fol. 147). He further testified that he was familiar with the sales made in Washington in 1900. That he knew nothing of the alleged agreement of October 6th, 1900, between Beavers and Towers and had no knowledge of the alleged payment of July 11th, 1901, or whether or not there was at that time any matter pending before Beavers relating to the machines in question, which required his official decision or action (fols. 150, 151). Charles Flint testified that from February, 1901, to March, 1903, he acted as assistant to the manager and to the treasurer of the Elliott-Hatch Booktypewriter Company (fol. 154). The majority of the machines bought

by the Post Office Department were known as number five's, which could not ordinarily be bought at less than two hundred dollars each (fol. 156). He was familar with the financial affairs of the Company, and if in 1901 the company had paid any money to Beavers or to Towers for Beavers, he would have known of it (fol. 158), but he knew of no such payments and had no knowledge that Towers was at any time authorized by the Company to pay Beavers any money whatever (fol. 158). He knew nothing whatever of the alleged agreement between Beavers and Towers, or the receipt by Beavers of any of the Company's funds (fol. 160). Howard M. Jacobs testified that from March 15th, 1900, to March 1st, 1903, he was continuously employed by the Company as its bookkeeper and cashier. He knew how and for what purpose the funds of the Company were disbursed (fol. 164) and that no payment whatever was made to Beavers, or caused to be paid to Beavers, by the Company or any of its agents (fol. 164). He had no knowledge whatever of the alleged agreement or of any facts relating to it (fol. 165). M. D. Helm testified that some years prior to October 6th, 1900, he had made an effort to introduce the Elliott-Hatch Booktypewriter into the Post Office Department, and for this purpose in 1898 had called upon Perry S. Heath, then First Assistant Postmaster General (fol. 171). He discussed the merits of the machine with the First Assistant Postmaster General, and received from him a card of introduction to some one in the Department. After this some machines were installed, but the witness never had any conversation with Beavers with reference to

their installation, and so far as he knew, Beavers had nothing whatever to do with the matter (fol. 172). He knew nothing of the alleged agreement nor of the supposed receipt of money by Beavers from Towers (fol. 173). He had known Towers for twenty years and was thoroughly familiar with his methods of doing business (fol. 174). He knew that Towers had made a practice of purchasing and cashing checks and drafts for his friends, and in fact that this was almost a daily occurrence (fol. 75). To support his statements, he produced a check (fols. 90, 176, 177) given by him on one occasion to Towers, who in exchange had given him a New York draft for the same amount. The witness stated that this transaction was representative of many others (fol. 178). Evander H. Schley testified that since January 1st, 1899, he has been Treasurer and Secretary of the Elliott-Hatch Book-typewriter Company. He had entire charge of the finances of the company and was familiar with all checks drawn and all moneys paid out by the company. He testified that if the company had paid Towers any money for the purpose of influencing Beavers' official judgment with reference to the machines, he would have known it, but that he did not know of any such payment being made (fol. 184). He had no knowledge whatever of the existence of the alleged agreement between Beavers and Towers, knew nothing of the alleged payment of funds to Beavers, and knew that the company did not authorize Towers to make any such payment (fol. 186). The testimony of the plaintiff, Little, disclosed that he had no personal knowledge of any of the transactions set forth in the indictment, and

that his only source of information was the indictment (fol. 187).

For the purpose of making a statement in his own behalf, Beavers took the stand and was sworn (fol. 191).

He stated that it was not at his instance that the Elliott-Hatch Booktypewriter was placed or installed in the Post Office Department, but that this had been done under the direction of the First Assistant Postmaster General. In making allowances for the machines he acted under instructions from the First Assistant Postmaster General and so acted with reference to the purchase of the machines mentioned in the indictment. He denied emphatically the making of the alleged agreement with Towers and that on July 11th, 1901, he had received a draft from him for the purpose of influencing his official conduct with reference to the machines in question. He swore positively that on July 11th, 1901, there was no matter relating to the Elliott-Hatch Booktypewriter Company pending before him. He stated that he might have received a draft from Towers for three hundred and fifty dollars. That, if he did, it was in the nature of a loan (fol. 193). He denied the receipt of such draft pursuant to a corrupt agreement or for any wrongful purpose. He had known Towers for about seven years, and that Towers had cashed checks and bought drafts for him scores of times, and each time Beavers had reimbursed him (fol. 193).

This statement was made pursuant to Section 196 of the New York Code of Criminal Procedure, which provides :

"When the examination of the witnesses on the

part of the People is closed, the Magistrate must inform the defendant, that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge and to explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial."

This statute is here applicable, under the established doctrine that proceedings under Section 1014 are in all respects similar to criminal proceedings instituted before a committing Magistrate in the State where the arrest is made, and are controlled and governed by the rules of evidence and procedure in such State (*Re Dana*, 68 Fed., 886, 893; *U. S.* vs. *Rundlett*, 2 Curt., 42; *U. S.* vs. *Case*, 8 Blatch., 251; *U. S.* vs. *Horton*, 2 Dill., 94; *U. S.* vs. *Brawner*, 7 Fed., 86, 90; *U. S.* vs. *Martin*, 17 Fed., 150, 156; *Re Burkhardt*, 33 Fed., 25, 26; *U. S.* vs. *Green*, 100 Fed., 941).

It may be conceded that this Court will not review questions relating merely to the sufficiency of evidence to sustain a finding of probable cause, and that if there was before the Commissioner competent legal evidence to sustain his finding, such finding will not be reviewed here (*Green* vs. *Henkel*, 183 U. S., 249; *U. S.* vs. *Lantry*, 30 Fed., 232; *U. S.* vs. *Green*, 108 Fed., 816; *Price* vs. *McCarthy*, 89 Fed., 84).

We raise no question of sufficiency. Although in a removal proceeding where no competent evidence was offered in rebuttal, this Court held that an indictment was *prima facie* evidence of the petitioner's guilt (*Beavers* vs. *Henkel*, 194 U. S., 73), it

is perfectly clear that an indictment is not legal evidence of guilt such as a Court or jury might hear. It is a mere charge or accusation drawn by a prosecuting officer. It is not evidence or proof in the ordinary acceptation of those terms in courts of justice. When, therefore, its averments are controverted by sworn proof, such as might be heard by a jury on a criminal trial, the case is not one presenting a question of sufficiency such as would arise from a conflict between testimony of equal competency and probative force.

To determine that an accusation which is controverted by six witnesses and by the sworn statement of the accused is still proof of probable cause, is in effect a decision that it is conclusive and incapable of rebuttal. That it was so regarded by the Commissioner is shown by his statement on the record (fol. 190): "I do not think that in an examination like this testimony should be gone into which may be competent testimony and necessary testimony upon the trial of the indictment."

The decision in *Beavers* vs. *Henkel* (194 U. S., 73), went no further than the earlier decisions of the lower courts, which have recognized an indictment *when standing alone and uncontroverted* as *prima facie* evidence of probable cause sufficient to sustain the finding of the Commissioner. Thus in *Alexander's Case* (1 Lowell, 530), Judge Lowell said: "Before the Commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself and uncontradicted, it seems to be enough according to our practice to authorize the warrant." In *U. S.* vs. *Pope* (24 U. S. Inter. Rev. Rec., 29), com-

menting on his own decision in Alexander's case, Judge Lowell said: "This was a very convenient decision for the United States and a sound one, but it rests rather on long usage than on any principle of law, because generally speaking an indictment is evidence of nothing but its own existence, unless there is some statute giving it greater effect. It is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence of criminality."

In *U. S.* vs. *Green* (100 Fed., 941; 108 Fed., 816), it was held that an indictment is not conclusive evidence of the facts stated therein, and in *Green* vs. *Henkel* (183 U. S., 241) no doubt was suggested as to the correctness of these views. There competent legal evidence of probable cause, in addition to the indictment, was before the Commissioner, *and the question of the conclusiveness of the indictment was not before this Court.*

Nor was the conclusiveness of an indictment in removal proceedings considered in *Beavers* vs. *Henkel* (194 U. S., 73), for in that case this Court held that the accused had offered no competent evidence before the Commissioner tending to establish want of probable cause, and that under these circumstances the indictment was *prima facie* evidence. That an indictment is not and should not be regarded as conclusive in removal proceedings is abundantly established by authority (*U. S.* vs. *Green*, 100 Fed., 941; *In re Richter*, 100 Fed., 295; *In re Belknap*, 96 Fed., 614; *In re Wood*, 95 Fed., 288, *U. S.* vs. *Price*, 84 Fed.,

636; *In re Price*, 83 Fed., 830; aff'd, 89 Fed., 84; *In re Dana*, 68 Fed., 886; *U. S.* vs. *Fowkes*, 49 Fed., 50; *In re Wolf*, 27 Fed., 606; *Alexander's Case*, 1 Lowell, 530; *U. S.* vs. *Haskins*, 3 Sawy., 262; *U. S.* vs. *Pope*, 24 Inter. Rec., 29).

CONCLUSION.

IT IS THEREFORE SUBMITTED THAT THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE APPELLANT DISCHARGED FROM CUSTODY UNDER THE WARRANT OF COMMITMENT BY WHICH HE IS NOW HELD TO AWAIT REMOVAL TO THE DISTRICT OF COLUMBIA.

BANKSON T. MORGAN,
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WASHINGTON, February 20th, 1905.